Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1995

FEDERATION OF CONNECTICUT TAXPAYER ORGANIZATIONS, ET AL.,

Petitioners

versus

JOSEPH M. SUGGS, JR., ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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58 pp

QUESTIONS PRESENTED

The following questions are presented for review:

1. Whether a state taxpayer, as a taxpayer, has standing in federal court to challenge the constitutionality (under the Fifth and Fourteenth Amendments to the Constitution of the United States) of a State statute, enacted under the taxing and spending authority of the State Legislature, which appropriated state tax revenues in the amounts which exceed specific limitations (under Article III, Section 18 (b) and (c) of the Constitution of the State of Connecticut) on the ability of the State Legislature to appropriate state tax revenues?

2. Whether the holding of this Honorable Court in *Doremus v. Board of Education*, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952) controls the issue of state taxpayer standing in all cases challenging the constitutionality of state appropriation enactments?

3. Whether the holding of this Honorable Court in *Deakins v. Monaghan*, 484 U.S. 193, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988) precludes the exercise of discretion on the part of the courts below to Abstain when the only remedy which will protect the state taxpayers from the irreparable loss of a clearly defined and substantial amount of state tax revenues, namely a preliminary injunction, is not available in the state forum due to the State's interpretation of its Sovereign Immunity?

PARTIES TO THE PROCEEDING

FEDERATION OF CONNECTICUT TAXPAYER ORGANIZATIONS, WEST HARTFORD TAXPAYER ASSOCIATION, INC., WETHERSFIELD TAXPAYERS ASSOCIATION, INC., S.T.O.P. (Stop Taxpayers Overpaying), VERNON TAXPAYERS ASSOCIATION, POMFRET ASSOCIATION OF CONCERNED TAXPAYERS, TAXPAYER ADVOCATES FOR BLOOMFIELD, WINDHAM-WILLIMANTIC TAXPAYERS ASSOCIATION, ALLEN HOFFMAN, JOHN J. MONACO AND FRED STANDT, individually and on behalf of all other Connecticut Taxpayers similarly situated,

Petitioners

versus

JOSEPH M. SUGGS, JR., Treasurer of the State of Connecticut, WILLIAM E. CURRY, JR., Comptroller of the State of Connecticut, WILLIAM CIBES Secretary, Office of Policy and Management, and RALP RALPH J. CARUSO, Director, Office of Fiscal Analysis,

Respondents

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Second Circuit entered in this matter on June 21, 1995. This petition is filed within ninety (90) days of the entry of the Opinion and Judgment below.

OPINIONS BELOW

The Opinion and Judgment of the United States District Court for the District of Connecticut at Bridgeport, entered on November 30, 1994, and the Opinion and Judgment of the United States Court of Appeals for the Second Circuit, entered on June 21, 1995, are reprinted in a separate Appendix to this Petition, pages A-2 through A-10. The Opinion of the United States District Court for the District of Connecticut at Bridgeport is unreported. The Opinion of the United States Court of Appeals for the Second Circuit is similarly unreported.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Second Circuit, affirming the Opinion and Judgment of the United States District Court for the District of Connecticut at Bridgeport, were entered on June 21, 1995, and the Judgment was issued as mandate on July 13, 1995. The Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Sec. 1253 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provisions of the Constitution of the United States.

Article III, Sections 1 and 2

Section 1: The judicial power of the United States shall be vested in one supreme Court, and in such

inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of a another State;-between citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. How the Federal Questions Were Presented

The Federal Constitutional questions involved in the cause *sub judice* were first presented in the Petitioners' Complaint, Order to Show Cause, Motion for Preliminary Injunction and Affidavit and Memorandum of Law in Support thereof filed pursuant to 28 U.S.C. Sec. 1343 (a) (3), 42 U.S.C. Sec. 1983 and Rule 56 of the Federal Rules of Civil Procedure in the United States District Court for the District of Connecticut at Bridgeport. The aforementioned Complaint for Injunctive Relief and Declaration of Rights states, *inter alia*, as follows:

1.

This action is brought to redress violations and threatened violations of the United States Constitution, more specifically, the 5th and 14th Amendments thereof,

and under federal law, particularly 42 U.S.C. Sec. 1983 (1979) and 28 U.S.C. Sec. 1343 (a) (3) (1979). (Complaint, par. 16)

2.

This action is brought by the Plaintiff taxpayer organization and related associations on behalf of their individual taxpayer members and by the three individual taxpayers on behalf of themselves and all other Connecticut taxpayers similarly situated, all of whom would have standing in their individual capacity to bring this good faith pocketbook action to prevent the illegal expenditure of a measurable amount of state taxpayer funds by state officials, including the trustees, general assembly and others, who are attempting to disburse public moneys derived from the Plaintiffs in the form of tax revenues in excess of the state officials' legal authority as set out under state law, more specifically, Art. III, Section 18 (b) & (c) of the Connecticut State Constitution. This attempt on the part of state officials to disburse state tax revenues in excess of their legal authority constitutes a taking of the Plaintiffs' property, namely their individual contribution to the general tax revenues being illegally disbursed, without due process of law in violation of their individual property rights created under state law and guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution resulting in significant financial loss to the taxpayers of the state of Connecticut. (Complaint, par. 19)

3.

On November 3, 1992, the citizens of the state of Connecticut approved a constitutional amendment set forth on the ballot as Question #2, "Shall the constitution of the state be amended to impose a limit on state expenditures." The voters approved that amendment by a more than 4 - 1 majority, 829,868 voting yes and 195,630 voting no. On November 25, 1992, the Secretary of the State certified approval of the Amendment and it immediately became part of the Connecticut Constitution as Art. III, Sec. 18 (a), (b) & (c). (Complaint, par. 20)

4.

Section 18 (b) by its term established what is called a constitutional spending cap and provides that, "The general assembly shall not authorize an increase in general budget expenditures for any fiscal year above the amount of general budget expenditures authorized for the previous fiscal year by a percentage which exceeds the greater of the percentage increase in personal income or the percentage increase in inflation." The only exception contained in the constitutional spending cap is for the payment of bonds, notes or other evidences of indebtedness.(Complaint, par. 21)

5.

Section 18 (c) of the constitution, which also became effective on November 25, 1992, provides that, "Any unappropriated surplus shall be used to fund a budget reserve fund or for the reduction of bonded

indebtedness; or for any other purpose authorized by at least three-fifths of the members of each house of the general assembly." (Complaint, par. 26)

* * * *

Petitioner plead the facts in the case; that no adequate remedy at law existed; and prayed for the relevant declaratory injunctive relief.

II. Factual Background

The state constitutional amendments involved became part of the constitution upon certification by the Secretary of the State on November 25, 1992. On May 1, 1993, the Connecticut general assembly adopted P.A. 93 - 80, A State Budget for the Biennium 1993 - 1995. Under the constitutional spending cap contained in Sec. 18 (b), total capped general budget expenditures could not exceed $7,003.7 million in Fiscal Year (FY) 1993 - 94 and $7,318.2 million in FY 1994 - 95. The general assembly appropriated amounts in excess of these constitutional limits by $799.9 million in FY 1993 - 94 and $ 804.4 million in FY 1994 - 95. (Complaint pars. 22 - 25)

At the end of FY 1992 - 93, there remained $224.1 million in unappropriated surplus finds. Under Sec. 18 (c), these funds should have been used for retiring bonded indebtedness or for deposit in the budget reserve fund. P.A. 93-80 did not receive a three-fifths vote in either house, nevertheless, the general assemble "rolled over" these funds into FY 1993 - 94 and FY 1994 - 95 for debt service. (Complaint pars. 26 - 27).

The Petitioners invoked the jurisdiction of the district court to enjoin the disbursement of state tax revenues in contravention of specific state constitutional limitations. There was no discussion in the complaint as to the purpose of these excess disbursements. To the Petitioners, the purpose of the expenditures is irrelevant. It is the abuse of the authority conferred under state law which is sought to be enjoined, not the application of the funds in question to any allegedly illegal purpose.

III. Proceedings Below

On April 25, 1994, the Petitioners filed a Complaint, Order to Show Cause, Motion for a Preliminary Injunction and an Affidavit and Memorandum of Law in Support thereof in the United States District Court for the District of Connecticut at Bridgeport. This action was a re-institution of a prior action filed in the United States District Court for the District of Connecticut which had been dismissed for lack of subject matter jurisdiction under Rule 12 (b)(1). That Judgment of Dismissal had been affirmed by the United States Court of Appeals on March 15, 1994. The Opinion and Judgment of the United States District Court and the United States Court of Appeals in that matter are set out in the attached Appendix at A-11 through A-18. The complaint in the instant action was corrected in response to the prior decision.

Prior to any responsive pleadings by the Respondents, a Status Conference was held on May 4, 1994. At the Status Conference, Magistrate Judge Holly B. Fitzsimmons denied the Motion for Preliminary Injunction *without prejudice to renewal* after the

jurisdictional issues were resolved. The court then scheduled briefing and oral argument on a Motion to Dismiss which was to be filed by the Respondents. On June 2, 1994, oral argument was held on the Motion to Dismiss.

On October 12, 1994, Magistrate Judge Fitzsimmons filed a Ruling granting the Motion to Dismiss. In the Ruling, the district court described the re-instituted allegations as follows, "However recast, plaintiffs' complaint is the same; that the General Assembly appropriated funds in ways contrary to the state constitution, and that the state officials responsible for disbursing the money should (1) be stopped from disbursing it as the General Assembly has directed; and (2) be ordered to disburse it as the plaintiffs argue the constitutional spending cap requires." Magistrate Judge's Ruling on Defendants' Motion to Dismiss at A-4. The district court then decided, "This is not a claim upon which federal relief can or should be granted. These are issues which, under principles of federalism, the state court should address first.In the event that this court might still have jurisdiction, it would abstain from exercising it." *Id.*, at A - 5.

The Petitioners took an immediate appeal to the United States Court of Appeals for the Second Circuit on the jurisdictional issues. Since the Motion for a Preliminary Injunction had been denied *without prejudice to renewal* before the Respondents were afforded an opportunity to respond, rather than appeal the denial of that motion, the Petitioners asked the circuit court to reverse the judgment below on the jurisdistional issues and remand with instructions to immediately take up the Petitioners' Motion for a Preliminary Injunction. Oral argument on the appeal was

held June 15, 1995. The Circuit Court issued its Judgment on June 21, 1995. Once again, the court stated the Petitioners' allegations, "The crux of Appellants' lawsuit is that they have a state-created property interest in funds collected through Connecticut state taxes, and such funds are being disbursed in violation of the federal constitution because the Connecticut state budget violates the Connecticut constitution." Order at A-8. The court then announced its decision:

> In general, federal courts have a duty to exercise jurisdiction. *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813-14 (1976). However , it is sometimes proper for federal court to abstain from exercising their jurisdiction when they are asked to adjudicate a federal constitutional challenge arising from an unsettled state law issue. *Railroad Comm'n v. Pullman Co.* 312 U.S. 496, 500 (1941).
>
> We find that all three of these [*Pullman*] conditions are present in the instant case. The supposed federal issue only exists if the Connecticut budget is truly unconstitutional, and a Connecticut state court could hold that the budget was valid under the Connecticut constitution, which would obviate any challenge under the federal constitution.
>
> Finally, the state law is unclear in the sense that the federal court have little competence to adjudicate state issues so close to the core of the mechanism of state government. Order at A-9.

For the reasons set forth below, the Petitioners believe that not only the decisions of the courts below

but the entire subject of state taxpayer standing in federal court requires review by this Honorable Court and they respectfully request that this Court exercise its discretion and grant this Petition.

Reasons For Granting The Writ

I. There Exists a Conflict Among the Circuits as to the Availability of Taxpayer Standing in Federal Constitutional Challenges to Appropriations of Tax Revenues by State Legislatures.

The Petitioners herein cannot in good faith maintain that the decisions of the courts below have created a split between the circuits on the critical issue of standing. That is because these splits existed well in advance in the rulings in the instant case. Because of the significant amount of state tax revenues involved and the need for immediate injunctive relief which only the federal court could provide, the Petitioners decided from the outset to seek the protection of the federal forum and conducted extensive pre-filing research into the area of state taxpayer standing. What the Petitioners found were clear and irreconcilable conflicts between the circuits on almost every significant jurisdictional issue.

This Honorable Court has granted seven Petitions for Certiorari in cases filed by state taxpayers challenging state spending as violating the federal constitution. Of these Petitions, five were issued to the highest courts of individual states. Two were issued to the United States Court of Appeals for the Eighth Circuit in state taxpayer challenges to state spending which originated in the district courts. Despite this impressive

number of Petitions granted, there is very little discussion by this Honorable Court of the elements or requirements for state taxpayer standing in federal court. In the first of these cases, *Hawke v. Smith*, 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871 (1920), this Honorable Court assumed jurisdiction *sub silentio*. In the fourth case, *Adler v. Board of Education*, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517 (1952), in its opinion, this Honorable Court never discussed who had brought the action. If it were not for the dissent of Mr. Justice Frankfurter, no one would have known it was a state taxpayer action, *Id.*, at 501 - 502. In this Honorable Court's most recent state taxpayer decision, *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989), there was a 4 - 4 split among the Justices as to whether or not state taxpayer standing was an issue in the case with four of the Justices apparently disagreeing with the analysis of that issue by Mr. Justice Kennedy who was joined by three other Justices including the Chief Justice. *Id.*, at 619 - 620, 109 S.Ct. at 2054 (Mr. Justice Brennan, concurring in part and concurring in the judgment). The result of this failure to clearly enunciate precisely what standing state taxpayers have and what its jurisdictional limits are is that these decisions have become more important for what this Honorable Court did not say than what it did say. This leaves state taxpayer litigants, their counsel and the courts below attempting to navigate by negative inference as opposed to positive direction. In this light, the resulting conflicts were predictable.

The Petitioners are lead by a state wide taxpayer federation and seven individual local taxpayer associations. They were listed as lead plaintiffs despite the fact that there is a split in the circuits as to whether

or not taxpayer organizations have standing in state taxpayer cases. In *Hoohuli v. Ariyoshi*, 741 F.2d 1169 (9th Circuit 1984), the court decided that the taxpayers union did not have standing even though its individual members did. *Id.*, at 1181 (The Tax Payers Union is conceded not to be a taxpayer and therefore the district court's dismissal is affirmed). In *Colorado Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394 (10th Cir. 1992), *cert. denied*, U.S. , 113 S.Ct. 1360, 122 L.Ed.2d 739 (1993), the court reached the merits in a state taxpayer challenge without expressing any concern with the Taxpayers Union's standing to prosecute the action. *Accord, Annunziato v. New Haven Board of Aldermen*, 555 F.Supp. 427, 431 (D. Conn. 1982)(municipal taxpayer organization had standing to represent taxpayer members to the extent they would have standing).

Of greater concern to the Petitioners was precisely how to plead the action. In *Hoohuli v. Ariyoshi*, *supra.*, the Ninth Circuit approved the following allegations:

> Each of the individual plaintiffs have set forth his or her status as a taxpayer. The challenge is to the "appropriating, transferring, and spending of taxpayers' money from the General Fund of the State Treasury". Plaintiffs complain that, "[b]y creating the class identified as 'Hawaiians' in the office of Hawaiian Affairs, in addition to the class of 'Native Hawaiians,' the taxpayers have been burdened with the necessity to provide more taxes to support said second class." The pleadings set forth with specificity amounts of money appropriated and spent for allegedly unlawful purposes. This case fits the description of a "good-faith pocketbook action" set forth in *Doremus.*" 741

F.2d at 1180

The Seventh Circuit, in a county taxpayer case, approved allegations in a complaint, "[W]hich charged that the defendants violated *state* law by failing to distribute collected tax revenues plus interest to the local public entities, thereby conspiring to deprive and actually *depriving them of property without due process of law*, and of the equal protection of the laws, in violation of 42 U.S.C. Secs. 1983 and 1985". (emphasis added) *Board of Education of Valley View v. Bosworth*, 713 F.2d 1316, 1317 (7th Cir. 1983). Unfortunately, the Sixth Circuit in *Taub v. Commonwealth of Kentucky*, 842 F.2d 912 (6th Cir. 1988), *cert. denied*, 488 U.S. 870, 109 S.Ct. 179, 102 L.Ed.2d 148 (1989) specifically rejected the pleadings described in *Hoohuli v. Ariyoshi* and the *Hoohuli* decision by name. *Id.*, at 918 (We respectfully disagree with the court's conclusion in *Hoohuli v. Ariyoshi).*

The pleadings in the instant action were modeled after those approved by the Ninth and Seventh Circuits in *Hoohuli v. Ariyoshi* and *Board of Education Valley View v. Bosworth*, respectively. Petitioners acknowledge that these pleadings would not have survived a Motion to Dismiss in the Sixth Circuit in the wake of *Taub v. Commonwealth of Kentucky*, and now they have not survived a Motion to Dismiss in the Second Circuit.

The conflict over pleadings reflects the deeper dispute over whether or not the double nexus requirement of *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) which is required of federal taxpayers is also required of state taxpayers. In the aftermath of this Honorable Court's conflicting comments in *ASARCO, Inc. v. Kadish*, *supra.*, the

circuits are divided over whether or not this Honorable Court will extend the double nexus requirement to state taxpayers. The Ninth Circuit in *Hoohuli v. Ariyoshi* has decided that state taxpayers do not have to comply with the double nexus requirement. *Hoohuli v. Ariyoshi, supra.*, 741 F.2d at 1179 *(Flast* does not appear to have affected the availability of standing for state taxpayers challenging state statutes). The Tenth Circuit agrees. *Colorado Taxpayer Union, Inc. v. Romer, supra.*, 963 F.2d at 1399 (*Flast* does not directly govern this appeal because it appeals to federal taxpayer standing issues, not questions relating to standing for state taxpayers). The Sixth Circuit in *Taub v. Commonwealth of Kentucky* appears to be going in the opposite direction and limiting state taxpayer standing in federal court in accordance with *Flast*. In fact, the Sixth Circuit seems to be limiting state taxpayer standing to Establishment Clause cases. *Taub v. Commonwealth of Kentucky, supra.*, 842 F.2d at 917 (There are very few decisions concerning standing of state taxpayers to sue in federal court where the Establishment Clause is not an issue). In state taxpayer cases which do not involve the Establishment Clause, the rule in the Sixth Circuit appears to be that the concept of Federalism precludes the exercise of jurisdiction by a federal court. *Id.*, at 919 (A sovereign must have the authority to determine how tax revenues are to be spent, or the power to tax is illusory. Thus, state sovereignty extends to the total conduct of a state's fiscal affairs).

In the instant action, the Respondents clearly argued in favor of a double nexus approach to state taxpayer standing. The Respondents cited in support of this proposition two municipal taxpayer decisions in the United States District Court for the District of

Connecticut , *Annunziato v. New Haven Board of Aldermen*, *supra.*, (municipal taxpayers had standing to challenge sale of building assessed at $30,000 for $1 to a religious group for use as a school), and *Ridgefield Women's Political Caucus v. Fossi*, 458 F.Supp. 117 (D. Conn. 1978)(Newman, Judge)(Parents of girls excluded from town supported Boys Club used municipal taxpayer status to challenge town's financial support as violating the Equal Protection clause). The district court appears to have accepted that premise and dismissed the Petitioners complaint due to a lack of a federal predicate. Significantly, the circuit court relied on the concept of Federalism to affirm the decision below. The Second Circuit appears poised to follow the Sixth Circuit and restrict state taxpayer standing to Establishment Clause cases and apply the concepts of Federalism to preclude the exercise of jurisdiction in other cases. There are two specific reasons why the Petitioners can maintain this with reasonable certainty. The first is that during oral argument, the circuit court specifically noted that authorities relied upon by the Petitioners involved Establishment Clause cases and seemed to dismiss them as controlling authority in this case. The second reason is that the Supreme Court of the State of Connecticut has established procedures whereby a federal district court or circuit court of appeals can Certify questions of state law directly to the Connecticut Supreme Court. The Petitioners in the courts below specifically suggested to the courts that if the court felt that unsettled issues of state law were involved and, further, that it was appropriate for these issues to be resolved by the state courts, then the federal court should retain jurisdiction and Certify the state law issues to the state Supreme Court for resolution. The circuit court rejected this

suggestion and dismissed the action. In light of the availability of Certification, its concern could not have been with making an incorrect reading of state law. Abstention in this case goes beyond the specific legal issues involved in this case. The circuit court appears to have been making a policy decision which in the minds of the Petitioners places the concepts of Federalism above the federal court's obligation to vindicate federal rights where state taxpayer claims are involved..

If the Second Circuit joins the Sixth Circuit and bars non-Establishment Clause challenges under the concept of Federalism, they will be in direct conflict with decisions in the Seventh and Ninth Circuits where the circuit courts specifically rejected objections to their exercise of jurisdiction based upon Federalism.. In *Board of Education of Valley View v. Bosworth, supra.*, a county taxpayer case, the Seventh Circuit reasoned as follows:

> *Younger* and similar cases are based on a desire not to interfere with a state's sovereign functions. In the present case no such sovereign function is at stake because the plaintiffs do not challenge the policies or means by which the state assesses and collects taxes; on the contrary, they defend that system and seek to compel compliance with it by enforcing its requirement that collected taxes be distributed. Their claim thus vindicates state policy rather than interfering with it. 713 F.2d at 1320.

The Ninth Circuit reached a similar conclusion when Comity was raised as a shield against the exercise of jurisdiction by the federal court. *Hoohuli v. Ariyoshi, supra.*, 741 F 2d at 1177 (Because this [state taxpayer]

case is properly only one for injunctive relief, [Comity] does not deprive federal court from providing relief from allegedly unconstitutional state spending schemes.)

The Petitioners reviewed all of the relevant case law and based upon their research, filed this action in good faith. They believe that the Sixth Circuit and the courts below are misreading the comments of Mr. Justice Kennedy in *ASARCO, Inc. v. Kadish*, and they believe that *Doremus v. Board of Education* remains the standard for state taxpayer standing in federal courts. Nevertheless, there is no denying that there is a great deal of confusion in this area. Prior attempts to reconcile the differences between cases have only resulted in new conflicts between the circuits. In *Colorado Taxpayers Union, Inc. v. Romer, supra.* the Tenth Circuit tried to harmonize the comments of Mr. Justice Kennedy in *ASARCO, Inc. v. Kadish* and the Sixth Circuit's decision in *Taub v. Commonwealth of Kentucky.* Instead, all it did was create an additional conflict between the circuits, this time between the Tenth Circuit and the Eighth Circuit's decision in *Minnesota Federation of Teachers v. Randall*, 891 F.2d 1354 (8th Cir. 1989). First, the Tenth Circuit agrees with Mr. Justice Kennedy that, "Supreme Court jurisprudence indicates that a state taxpayer must show that a distinct and palpable injury resulted from the allegedly illegal appropriation or expenditure." *Colorado Taxpayers Union, Inc. v. Romer, supra.*, 963 F.2d at 1402. The circuit court then agrees with the Sixth Circuit and the dissent in *Hoohuli v. Ariyoshi* that the concept of Federalism signals caution in the exercise of jurisdiction in this area. *Id.*, at 1402 - 03. Is the answer then to limit state taxpayer standing in federal court to Establishment Clause cases and bar all others invoking the concepts of Federalism? Not at all,

instead, the Tenth Circuit establishes the following standard, "In this case appellants allege that funds were appropriated and spent for an unlawful purpose; however, they do not allege a distinct and palpable injury that results from *an increased tax liability.*" (emphasis added) *Id.*, at 1403. This contrasts quite nicely with a decision directly *contra* in *Minnesota Federation of Teachers v. Randall, supra.*, 891 F.2d at 1358 (We do not believe that state taxpayers are required to show an increase in their tax burdens to allege sufficient injury to justify standing). Presumably, in the Tenth Circuit even Establishment Clause cases are precluded unless state taxpayer can show the activity will lead directly to a tax increase.

Given the splits in authority on basic jurisdictional issues, the Petitioners respectfully suggest that it is time for this Honorable Court to exercise its discretion and grant this Petition for the purpose of reviewing the entire subject of state taxpayer standing. This Honorable Court should take this opportunity to speak affirmatively on what the requirements of state taxpayer standing are and thereby bring clarity and uniformity to this important jurisdictional area. In fairness to future state taxpayer litigants, their counsel and the courts below, the Petitioners believe that this area is ripe for review.

II. The Petitioners Herein Have Standing to Challenge Legislation Enacted Pursuant to the Taxing and Spending Authority of a State Legislature Under the Holding of *Doremus v. Board of Education*

In *Flast v. Cohen, supra.*, this Honorable Court noted the difference between a good faith pocketbook action filed by taxpayers and a generalized grievance shared by all citizens. "In essence, Mrs. Frothingham was attempting to assert the State's interest in their legislature's prerogatives and not a federal taxpayers interest in being free of taxing and spending *in contravention of specific constitutional limitations* upon Congress' taxing and spending power." (emphasis added) *Id.*, 392 U.S. at 105, 88 S.Ct. at 1954. Although this Honorable Court was specifically addressing federal taxpayers, the Petitioners offer that the legal interest remains the same whether the taxpayers involved contribute municipal, county, state or federal taxes, namely, to be free of taxing and spending in contravention of specific limitations imposed upon the taxing and spending power invoked.

This common interest can be clearly seen in the seminal taxpayer case in federal court, *Crampton v. Zabriskie,* 101 U.S. 601, 25 L.Ed. 1070 (1880). In that case, this Honorable Court was faced with the following situation. Under New Jersey state law, the expenditures of the Board of Chosen Freeholders of the County of Hudson were restricted to the amount of money raised by tax for that year, unless in the event of the spread of an epidemic or contagious disease a greater amount should be required. The Board passed a resolution to purchase certain real property in Jersey City from Mr. Crampton in order to build a court-house and other county buildings. In payment for the land, the Board authorized the issuance of bonds in the amount of $225,720 to run for one year and drawing interest at the rate of 7% per annum. No provision was made by the Board for payment of the bonds beyond the general

declaration that they should be paid out of the amount appropriated for the next fiscal year. Several taxpayers of the county objected to the issuance of the bonds without provision for their payment by taxes. The county taxpayers first brought suit in state court and obtained a judgment that the action taken by the Board was invalid. However, for some procedural reason, neither the Board nor Mr. Crampton felt bound by the decision.

After the state court decision, Mr. Crampton filed suit to enforce the bonds. The county taxpayers filed an action in federal court to compel the court the Board to reconvey the land and for Mr. Crampton to return the bonds, and to enjoin the prosecution of the action to enforce their payment. This Honorable Court ruled as follows:

> Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county or the illegal creation of a debt which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question. The right has been recognized by the State courts in numerous cases; and from the nature of the powers exercised by municipal corporations, the great danger of their abuse and the necessity of prompt action to prevent irremediable injuries, it would seem eminently proper for courts of equity to interfere upon the application of the tax-payers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders. Certainly, in the absence of legislation restricting the right to

> interfere in such cases to public officers of the State or county, there would seem to be no substantial reason why a bill by or on behalf of individual tax-payers should not be entertained to prevent the misuse of corporate powers. The courts may be safely trusted to prevent the abuse of their processes in such cases. *Id.*, 101 U.S. at 609; 25 L.Ed. at 1071 -1072.

Crampton v. Zabriskie was certainly not the last taxpayer action filed in federal court challenging expenditures by public officials in contravention of *state* statutory limitations on the tax and spend powers. Similar cases have been decided by the Second Circuit, *U.S. v. City of New York*, 972 F.2d 464, 470 - 71 (2nd Cir. 1992)(city taxpayers had standing to challenge alleged violations of New York City's Gen. Mun. Law 103(1) by awarding contracts without competitive bidding); the Sixth Circuit, *Gwinn Area Community Schools v. State of Michigan*, 741 F.2d 840, 844 (6th Cir. 1984)(school district taxpayers had standing to challenge allocation of education funds under Mich. Comp. Laws Ann. Sec. 388.1601 - 1772 by failing to pass on federal aid to the school district); the Seventh Circuit, *Board of Education of Valley View v. Bosworth, supra.*, 713 F.2d at 1317 - 19 (county taxpayers had standing to challenge alleged violations of Ill. Rev. Stat., ch. 85, sec. 902 and ch. 120, sec. 761 by county officials who invested tax revenues at below market rates); the Ninth Circuit, *Hoohuli v. Ariyoshi, supra.*, 741 F.2d at 1177 - 81 (state taxpayers had standing to challenge disbursements pursuant to Hawaii Rev. Stat. 10 - 2 (4) & (5) for the benefit of "Native Hawaiians"); and the D.C. Circuit in *District of Columbia Com. Cause v. Dist. of Col.*, 858 F.2d 1, 3 - 8 (D.C. Cir. 1988)(district

taxpayers had standing to challenge alleged violations of D.C. Code Ann. 47 - 304 by expenditure of taxpayer funds to oppose ballot initiative).

The fact that in this case the statutory limitation on the taxing and spending power of the general assembly is contained in the state constitution as opposed to a state statute should be of no consequence. This Honorable Court has already ruled in a non-taxpayer action that Sec. 1983 reaches abuses of state authority that are forbidden by the State's statutes *or Constitution. Monroe v. Pape*, 365 U.S. 167, 173 - 174, 81 S.Ct. 473, 476 - 77, 5 L.Ed.2d 492 (1961)(overruled in part not relevant here, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 664 - 689, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)); *Accord, Zinermon v. Burch*, 494 U.S. 113, 124, 110 S.Ct. 975, 982 - 983, 108 L.Ed.2d 100 (1990). Additionally, the only way the people themselves may directly limit their public officials is through constitutional amendment. The Petitioners perceive no compelling logic in according greater respect to statutes enacted by the people's representatives than that given to the people's direct pronouncements through their constitution.

Although *Crampton v. Zabriskie* was a county taxpayer action, in the seven state taxpayer cases reviewed by this Honorable Court since that decision, this court has not limited or modified its reach as it applies to state taxpayers. These seven cases, in chronological order, were *Hawke v. Smith, supra.*, *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947); *Doremus v. Board of Education*, 342 U.S. 429, 72 S.Ct. 394, 96 L.Ed. 475 (1952); *Adler v. Board of Education, supra.*, *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d

1019 (1983); *Grand Rapids School District v. Ball,* 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985), and *ASARCO, Inc. v. Kadish, supra.* Five of these Petitions were issued to state supreme courts, however, two of these cases, *Marsh v. Chambers* and *Grand Rapids School District v. Ball,* were cases filed originally in the federal courts. Despite the opportunity to do so, this Honorable Court has never ruled that state taxpayers cannot file their original petitions in the federal courts. Four of these cases were Establishment Clause cases, *Everson v. Board of Education, Doremus v. Board of Education, Marsh v. Chambers* and *Grand Rapids School District* v. *Ball,* however, three were not, namely *Hawke v. Smith, Adler v. Board of Education* and *ASARCO Inc. v. Kadish,* and despite the opportunity to do so, this Honorable Court has never ruled that state taxpayers only have standing to challenge expenditures involving the Establishment Clause. Four of these cases were decided prior to this Honorable Court's decision in *Flast v. Cohen,* but three of the cases, namely *Marsh v. Chambers, Grand Rapids School District v. Ball* and *ASARCO, Inc. v. Kadish* were decided after *Flast,* yet, despite the opportunity to do so, this Honorable Court has never extended the double nexus requirement of *Flast v. Cohen* to state taxpayer petitions. *Everson v. Board of Education* and *Doremus v. Board of Education* were both essentially Establishment Clause cases, however, in *Everson* the state taxpayer plaintiffs were able to link their status as taxpayers to a definite and substantial expenditure of state tax revenue and had standing while in *Doremus,* the state taxpayers were not able to demonstrate a defined substantial expenditure of state tax revenues linked to the allegedly illegal activity and therefore lacked standing.

What rule then emerges from these decisions concerning standing of state taxpayers in the federal courts? The Petitioners believe that state taxpayers have standing to file their original petitions in the federal courts. The specific statutory limitation on the state's tax and spending authority is not limited to the Establishment Clause. State taxpayers need not satisfy the double nexus requirement of *Flast v. Cohen*, and, finally, even in Establishment Clause cases, to have standing state taxpayers have to demonstrate a direct injury in the form of a measurable and substantial amount of state taxpayer revenues which will be preserved by a favorable decision. The Petitioners in the instant action believe they satisfy all of these requirements. The allegations in the complaint which must be accepted as true for the purposes of a Motion to Dismiss clearly state that the State Legislature has appropriated funds in excess of their authority as limited by state law. This action is as close on the facts to *Crampton v. Zabriskie* as the federal courts have seen in 120 years. As in that case, there is no challenge to the specific purpose or use of the tax revenues in question. What is challenged is the abuse of authority on the part of state officials in appropriating funds in excess of their legal authority.

In the instant case, the district court decided that the abuse of authority on the part of state officials in disbursing state tax revenues in excess of a specific *state* law limitation was not sufficient to create a federal cause of action. It is unclear from this decision whether the district court is limiting state taxpayer standing to Establishment Clause cases or simply requiring a double nexus for standing, but in either event the Petitioners respectfully suggest that the district court's interpretation

of state taxpayer standing in federal court is in conflict with this Honorable Court's holding in *Doremus*. The district court then only mentioned abstention as an after thought noting that even if it had jurisdiction, it would abstain from exercising it. Because the circuit court affirmed on the basis of abstention without reaching any other issues, it is not clear what that court's view on this jurisdictional issue is. Nevertheless, the rule in the District of Connecticut now seems to be that state taxpayers must plead a second, federal nexus to survive a Motion to Dismiss.

The Petitioners have alleged that the appropriations made in excess of the State Legislature's authority amount to $1.9 Billion in the Biennium of FY 1993 - 95. Petitioners believe that these allegations meet not only the criteria of this Honorable Court in *Doremus v. Board of Education* but also satisfy the criteria of Mr. Justice Kennedy in *ASARCO, Inc. v. Kadish.*

The Petitioners are seeking injunctive relief to prevent the disbursement of the tax revenues in question. If the injunctive relief is granted, those revenues will not be disbursed and at the end of the fiscal year will be counted as unappropriated surplus funds. A favorable decision by this Honorable Court will definitely redress the abuse of power and protect the taxpayers and the public fisc.

As is discussed more fully, *supra.*, the Petitioners believe that the courts below are following the lead of the Sixth Circuit and limiting state taxpayer standing to Establishment Clause cases. This belief is based on the district courts requirement of something more than an allegation that public officials are spending taxpayer funds in contravention of *state* statutory limitations and the circuit court's reliance on the concepts of Federalism

to affirm the lower court ruling. If *Doremus v. Board of Education* still remains the rule controlling state taxpayer standing, then the Second and Sixth Circuits are not only in conflict with the other circuits, they are in conflict with the holdings of this Honorable Court.

III. In View of the Absence of Adequate Remedies in the State Forum, the decision of the Courts Below to Abstain Contravenes the Holding in *Deakins v. Monaghan*.

In *Deakins v. Monaghan*, the Third Circuit Court of Appeals was faced with a situation in which although there was an ongoing state court proceeding in which the parties before it were involved, the only remedy which could make the plaintiffs whole, namely money damages, was not available in the state forum but was available in the federal forum. In that case the district court had dismissed the federal complaint and chose to Abstain under the *Younger* doctrine. *Younger v. Harris*, 401 U.S. 37; 91 S.Ct. 746, 27 L.Ed 2d 669 (1971). The Third Circuit reversed the district court and this Honorable Court upon review affirmed the reversal. In that decision, this Court specifically held that, "[t]he District Court *has no discretion* to dismiss rather than to stay claims for monetary relief that *cannot be redressed in the state proceeding.*" (emphasis added) *Deakins v. Monaghan*, 484 U.S. at 202; 108 S.Ct. at 529. Although in the instant action we are dealing with abstention under the *Pullman* doctrine, the Petitioners believe the considerations underlying the decision in *Deakins v. Monaghan* are also present in this action."The federal abstention doctrine, first enunciated in *Younger v. Harris*, is based on the premise that ordinarily a state

proceeding provides an adequate forum for the vindication of federal constitutional rights, and so due reference ought to be paid the principles of comity and federalism." (emphasis added) (citations omitted) *Cullen v. Fliegner*, 18 F.3d 96, 103 (2nd Cir. 1994). As this Honorable Court stated in *Younger v. Harris*, "[c]ourts of equity should not act when the moving party has an adequate remedy at law *and will not suffer irreparable injury if denied equitable relief*".(emphasis added) *Younger v. Harris*, 401 U.S. at 43 - 44, 91 S.Ct. at 746.

The reason that Abstention was not appropriate in this case is that there is no adequate remedy at law in the state forum and if the courts below abstain, the Petitioners will in fact suffer irreparable injury.Under the law of the State of Connecticut, the Respondents who are the only parties who could provide effective relief and prevent the illegal disbursement of the state taxpayer funds at issue, are protected by the state's Sovereign Immunity and injunctive relief is not available in state court in the first instance. Unlike federal law which distinguishes between the state and officials of the state for remedial purposes under Sec. 1983, under state law there is no distinction between suits against state officials and the state. *Sentner v. Board of Trustees*, 184 Conn. 339, 342; 439 A.2d 1033, 1035 (1981): *Sentner* went on to decide that the only action which would lie against state officials for violation of the state statutes or constitution was for declamatory judgment and, further, that any prospective injunctive relief could only be granted if the injunction avoided undue interference with governmental functions and, even then, the better practice is for the court to suspend the effective date of the injunction until the state had an opportunity to comply voluntarily. *Id.*, at 344 - 45; 439 A.2d at 1036.

Without injunctive relief, the tax revenues disbursed will be irretrievably lost.

The Petitioners do not believe that in *Deakins v. Monaghan*, this Honorable Court was setting up a special rule for the remedy of money damages as opposed to all of the other remedies available under Sec. 1983. In *Deakins*, the request for injunctive relief had become moot prior to oral argument and this Honorable Court therefore declined to consider the propriety of dismissal of the respondents' claims for equitable relief. *Id.*, 484 U.S. at 201, 108 S.Ct. at 529. The Petitioners believe that the same rule as applied to the remedy of money damages should be extended to the claims for equitable relief as well. All of the federal remedies under Sec. 1983 are supplemental to state remedies and where the only effective relief lies in the imposition of an injunction in the first instance by the district court, relief which is not available in the state forum, then Petitioners believe that the holding in *Deakins v. Monaghan* controls and that the courts below were *without discretion* to abstain.

For the circuit court, the concept of Federalism was of paramount concern. In its decision, the court below is following the lead of the Sixth Circuit and essentially holding that state sovereignty extends to the total conduct of a state's fiscal affairs and the federal courts should not involve themselves in this area even where violations of the Due Process clause are alleged. Because in their view the concepts of Federalism mandated Abstention and dismissal of the complaint, the courts below did not reach the issue of whether or not they had the *discretion* to abstain under the holding in *Deakins v. Monaghan*. The Petitioners believe that the jurisdictional considerations should have been reversed.

The courts below should have considered first whether or not they had discretion to abstain and then taken up the balancing of Federalism versus vindication of federal rights. The Petitioners continue to assert that given the absence of a clear, adequate and effective remedy in state court combined with the availability of Certification to the State Supreme Court of unsettled questions of state law, even assuming that the courts below had discretion to abstain, it would have been an abuse of that discretion to do so. Given their position on Federalism, however, the courts below never reached these issues. These issues are now properly before this Honorable Court.

IV. This Matter is Not Moot

Because it is not possible for the Petitioners to obtain a review by this Honorable Court before the expiration to a biennial budget, this matter falls within the capable of repetition, yet evading review exception to the usual rules of Mootness. *Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911).*

CONCLUSION

For the reasons set forth herein above, a Writ of Certiorari should issue to review the Opinion and Judgment of the United States Court of Appeals for the Second Circuit.

Respectfully Submitted,

Robert A. Heghmann
Counsel for the Petitioners

APPENDIX

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FEDERATION OF CONNECTICUT
TAXPAYER ORGANIZATIONS, et al

CIVIL NO.

V.

3:94 CV 0673 (AHN)

JOSEPH SUGGS, JR., et al

JUDGMENT

This cause came on for consideration on the defendants' motion to dismiss before the Honorable Holly B. Fitzsimmons, United States Magistrate Judge, and

The Court having considered the motion and all the papers submitted in connection therewith filed its Magistrate Judge's Ruling on Defendants' Motion to Dismiss granting the motion and further recommended the case be dismissed with prejudice, as stated in the ruling,

The Honorable Alan H. Nevas, United States District Judge having after review and over objection, approved, adopted and ratified the Magistrate Judge's ruling,

It is **ORDERED** and **ADJUDGED** that judgment be and is hereby entered in favor of the defendants, and the complaint is dismissed without prejudice, in accordance with the Court's ruling.

Dated at Bridgeport, Connecticut this 30th day of November, 1994.

Kevin F. Rowe, Clerk

By_____

Carol E. Cannady
Deputy in Charge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FEDERATION OF CONNECTICUT
TAXPAYERS ORGANIZATIONS, et al

v. 3:94cv0673 (AHN)

JOSEPH SUGGS, JR. et al.

MAGISTRATE JUDGE'S RULING ON
DEFENDANTS' MOTION TO DISMISS

The Federation of Connecticut Taxpayer Organizations and other groups and individuals bring this lawsuit to challenge the decision of the Connecticut General Assembly to use state tax revenues to service the state debt rather than retire its bonded indebtedness. The Federation Claims that this action violates the state constitution, specifically Article III, sections 18(a), (b), and (c), and has sued the state treasurer, the state comptroller, the secretary of the Office of Policy and Management, and the director of the Office of Fiscal Analysis to enjoin them from disbursing state funds in excess of certain amounts, and to require them to use certain state tax revenues to retire bonded indebtedness under the supervision of the federal court.

This is the second lawsuit filed by the Federation to raise this claim. The earlier complaint was dismissed nearly a year ago; the dismissal was affirmed on March 15, 1994, by the Court of Appeals in an unpublished

opinion. That opinion described as "untenable" plaintiff's theory of federal liability: that state taxpayers have a property interest in Connecticut tax funds because the funds constitute a trust held in their interest, and that the defendant officials, in administering the tax revenues in accordance with the enacted state budget, are depriving taxpayers of property without due process of law because the budget is unconstitutional. [Dkt. No. 93-9360, Summary order at 2]. The Court of Appeals also suggested that "even under plaintiff's theory of the case, there would be a compelling argument for abstention under the Pullman doctrine since the district court could not decide the federal constitutional claim unless it decided a substantial issue of state law, namely, whether the budgets passed by the Connecticut General Assembly violated Sec. 18 to Article III of the Connecticut Constitution." [Summary order at 3]

Notwithstanding the clear message from both the District Court and the Court of Appeals that this controversy should be litigated in state court, the plaintiffs have refiled here. In an effort to circumvent the difficulties pointed out by the Court of Appeals, plaintiffs have recaptioned each count of the complaint as a "Violation of the Due Process Clause of the Fifth and Fourteenth Amendments," and alleged that their retained equity ownership in state tax revenues is a property right protected by the United States Constitution. They then reinvoke Section 1983 as a basis for remedial action by the federal court.

However recast, plaintiffs' complaint is the same: that the General Assembly appropriated funds in ways contrary to the state constitution, and that the state

officials responsible for disbursing the money should (1) be stopped from disbursing it as the General Assembly has directed; and (2) be ordered to disburse it as the plaintiffs argue the constitutional spending cap requires.

Defendants have again moved to dismiss. [Doc. # 15]

This is not a federal claim upon which federal relief can or should be granted. These are issues which, under principles of federalism, the state courts should address first. For the reasons set out in the November 30, 1993, opinion of Magistrate Judge Margolis, which was ratified by District Judge Nevas, and for the reasons stated in the Second Circuit's panel opinion, this case was dismissed once and should be dismissed again. To the extent that this Court might still have jurisdiction to entertain this cause of action, it should decline to exercise that jurisdiction and abstain.

The Motion to Dismiss [Doc. #15] is GRANTED. This case should be dismissed with prejudice to its refiling in federal court. This complaint, like the previous one, fails to state a claim upon which federal relief can be granted.

Filed at Bridgeport this 11th day of October, 1994.

Holly B. Fitzsimmons
United States Magistrate Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 21st day of June, one thousand nine hundred and ninety-five.

Present:

Honorable Ralph K. Winter,
Honorable J. Daniel Mahoney,
Honorable Dennis G. Jacobs,
Circuit Judges

FEDERATION OF CONNECTICUT
TAXPAYER ORGANIZATIONS, et al,
Plaintiffs - Appellants

v. # 94 - 9208

JOSEPH M. SUGGS, JR., et al,
Defendants - Appellees

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Federation of Connecticut Taxpayer Organizations, et al. ("Appellants") appeal from Judge Nevas's order approving and adopting the Recommended Ruling of Magistrate Judge Fitzsimmons dismissing Appellants' complaint. Appellants claim: (i) they have stated a valid federal claim over which the district court has subject matter jurisdiction, (ii) their claim is not barred by the Eleventh Amendment, (iii) abstention by the district court was an abuse of discretion, and (iv) appellees and their counsel should be sanctioned.

The crux of Appellants' lawsuit is that they have a state-created property interest in funds collected through Connecticut state taxes, and such funds are being disbursed in violation of the federal constitution because the Connecticut state budget violates the Connecticut constitution. We agree with Magistrate Judge Fitzsimmons that Pullman abstention is appropriate, and we note that we addressed this issue with respect to a similar complaint filed by Appellants. See Order, Docket No. 93-9360, March 15, 1994. We therefore affirm and decline to reach any other issues.

In general, federal courts have a duty to exercise jurisdiction. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-14 (1976). However, it is some times proper for federal courts to abstain from exercising their jurisdiction when they are asked to adjudicate a federal constitutional challenge arising from

an unsettled state law issue. Railroad Comm'n v. Pullman Co., 312 U.S. 496, 500 (1941).

There are three conditions for Pullman abstention. First, the state law at issue must be unclear. Second, the resolution of the federal issue raised must turn on interpretation of state law. Third, a state court could interpret the pertinent state law in such a way as to avoid the federal issue. Greater New York Metro. Food Council v. McGuire, 6 F.3d 75, 77 (2d Cir. 1993); see also United Fence & Guard Rail Corp. v. Cuomo, 878 F.2d 588, 594 (2d Cir. 1989).

We find all three of these conditions are present in the instant case. The supposed federal issue only exists if the Connecticut budget is truly unconstitutional, and a Connecticut state court could hold that the budget was valid under the Connecticut constitution. Finally, the state law is unclear in the sense that the federal courts have little competence to adjudicate state issues so close to the core of the mechanism of state governance.

Finally, we note that the order of appeal apparently stated that Appellants were also appealing from the denial of preliminary relief. We consider this claim abandoned because Appellants did not brief it. See Clark v. John Lamula Investors, Inc., 583 F.2d 594, 602 (2d Cir. 1978)(where "bald assertion" is made, court need not search the record to determine validity of claim); Fed.R.App.P. 28(a)(6)(requiring appellant's brief to contain "the contentions of the appellant on the issues presented and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on").

We therefore affirm.

Hon. Ralph K. Winter, U.S.C.J.
Hon. J. Daniel Mahoney, U.S.C.J.
Hon. Dennis G. Jacobs, U.S.C.J.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

FEDERATION OF CONNECTICUT
TAXPAYER ORGANIZATIONS, ET AL.

3:93cv02062 (AHN)

v.

NOV. 30, 1993

JOSEPH M. SUGGS, JR., ET AL.

RECOMMENDED RULING ON DISPOSITIVE MOTIONS

On October 14, 1993, plaintiffs, eight taxpayer associations and three individuals, commenced this purported class action; an amended complaint was filed four days later (Dkt. #7). The amended complaint concerns a constitutional amendment approved y Connecticut voters on November 3, 1992, which has become Conn. Const. Art. III, Secs. 18(a), (b) & (c). Plaintiffs argue that in adopting various budgets, the Connecticut General Assembly has violated these provisions. Plaintiffs' four counts allege as follows: violation of Section 18(c) regarding the 1992-93 Fiscal Year (First Count); violation of Section 18(b) regarding the 1993-94 Fiscal Year (Second Count); violation of Section 18(b) (Third Count); and violation of Section 18(b) regarding reduction of bonded indebtedness (Fourth Count). Plaintiffs seek a declaratory judgment, a

preliminary injunction, and a permanent injunction, requiring the defendant state officials to comply with Conn. Const. Art. III, Secs. 18(a), (b) & (c).

On October 14, 1993, plaintiffs filed the pending motion for preliminary injunction, brief in support, and affidavit in support (Dkt. ##4-6). On November 1, 1993, defendants filed the pending motion to dismiss and brief in support (Dkt. ## 14-15). On November 9, 1993, plaintiffs filed a brief in opposition to defendants' motion and in reply to their own motion, with a supplemental affidavit. With permission of the court (see Dkt. ##19-20), on November 17, 1993, defendants filed a reply brief (Dkt. #22).

For the reason stated below, defendants' motion to dismiss is granted, and the plaintiffs motion for preliminary injunction is denied without prejudice as moot.

I. Discussion

Defendants have moved to dismiss this action for lack of subject matter jurisdiction, under Fed.R.Civ.P. 12(b)(1), and for failure to state a claim upon which relief may be granted, under Fed.R.Civ.P. 12 (b)(6). Defendants argue that plaintiffs have not alleged a federal cause of action. In par. 16 of their amended complaint, plaintiffs allege that "[t]his action is brought to redress violations and threatened violations of the United States Constitution, more specifically, the 5th and 14th Amendments thereof, and under federal law, particularly 42 U.S.C. sec. 1983 (1979) and 28 U.S.C. Sec. 1343 (3) (1979)." However, as previously

described, plaintiffs' four counts and requests for relief are premised solely upon Connecticut constitutional law.

It is axiomatic that in order to assert a claim under 42 U.S.C. Sec. 1983, a plaintiff must assert a violation of federal constitutional or statutory law. Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 19 (1981); Mrs. W. v. Tirozzi, 706 F.Supp. 164, 167 & n.2 (D.Conn. 1989). There is no doubt, as plaintiffs argue, that the due process clause of the Fourteenth Amendment protects property rights, and in appropriate circumstances, taxpayers may commence lawsuits. The difficulty is, as previously indicated, that plaintiffs' claims arise solely out of state law, not federal law. Judge Burns specifically held, in Sawicki v. City of Groton, Civ. No. H88-11(EBB), slip. op. at 1 - 2 (D.Conn. July 7, 1989), that Sec. 1983 does not apply to claims made under the Connecticut Constitution.

Moreover, it is equally well-settled that suits against state officials which seek relief based upon violations of state law are barred by the Eleventh Amendment. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 106, 121 (1984).

Given this conclusion, here is no need to address defendants' other arguments.

II. CONCLUSION

Accordingly, defendants' motion to dismiss (Dkt. #14) is granted and accordingly, plaintiffs' motion for preliminary injunction (Dkt. #4) is denied without

prejudice to renewal in state court, which is the proper forum for adjudicating these claims.

See 28 U.S.C. Sec. 636(b)(**written objections to ruling must be filed with in ten days after service of same**); F.R.Civ.P. 6(a), 6(e) & 72; Rule 2 of the Local Rules for United States Magistrate Judges, United States District Court or the District of Connecticut; Small v. Secretary, H&HS, 892 F.2d 15, 16 (2d Cir. 1989)(**failure to file timely objection to Magistrate Judge's recommended ruling may preclude further appeal to Second Circuit)**

Dated at New Haven, Connecticut, this 30th day of November, 1993.

Joan Glazer Margolis
U.S. Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit., held at the United States Courthouse in the City of New York, on the 15th day of March, one thousand, nine hundred and ninety-four.

Present:

Honorable John M. Walker, Jr.,
Honorable Dennis G. Jacobs,
Circuit Judges,
Honorable Robert C. Zampano,
District Judge.

FEDERATION OF CONNECTICUT
TAXPAYER ORGANIZATIONS, et al.
PLAINTIFFS-APPELLANT

v. No. 93-9360

JOSEPH M. SUGGS, JR., et al.
DEFENDANTS -APPELLEES.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut (Nevas,J.) and was argued.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Plaintiff taxpayer organization appeals from a judgment of the United States District Court for the District of Connecticut (Alan H. Nevas, Judge) dismissing complaint brought by appellant, seven other taxpayer associations, and three individuals against four state officials under Sec. 1983 alleging that the Connecticut General Assembly violated a newly adopted amendment to the state constitution placing certain limitations on budget expenditures and use of surplus funds. The district court determined that the suit was premised solely on state law and dismissed for lack of subject matter jurisdiction. The court also held that the claims were barred by the Eleventh Amendment.

Plaintiff contends that its member taxpayers have a property interest in tax revenues they contribute; that the four defendant officials are trustees of these revenues; and that by making appropriations in accordance with the General Assembly's unconstitutional budgets, the defendants are depriving the taxpayers of their property interest without due process of law. Plaintiff argues that the lower court should have understood that federal law is central to the case since it is suing the four state officials who administer the tax revenues in order to prevent wrongful distribution of the funds, as opposed to suing the General Assembly for a declaration that its budgets violated the state constitution. This argument is seriously flawed.

As an initial matter, it is not up to the district court to divine the plaintiffs' theory of liability. Plaintiffs admit on appeal that the allegations in their complaint were "clumsy" and "could have been more artfully drafted." Plaintiffs' failure to specify how defendants violated their federal rights properly subjected their Sec. 1983 complaint to dismissal. Mian v. Donaldson, Lufkin & Jenrette Secs. Corp., 7 F.3d 1085, 1088 (2d Cir. 1993).

More importantly, plaintiffs theory of liability is untenable. It relies on the proposition that state taxpayers have a property interest in Connecticut's tax funds because the funds constitute a trust which is held in their interest. However, the cases it cites for this proposition all relate to municipal taxpayers. See Crampton v. Zabriskie, 101 U.S. 601 (18879)(challenging county's issuance of bonds payable out of tax revenue); Arminio v. Butler, 440 A.2d 757 (Conn. 1981)(challenging validity of municipal budget and legality of expenditures by town officials); Murray v. Egan, 256 A.2d 844 (Conn. Super.Ct. 1969)(challenging city's use of public finds for a special, advisory non binding city election); City of New London v. Brainard, 22 Conn. 552 (Conn. 1853)(challenging city's appropriation of $1,500 to celebrate Independence Day). Plaintiff does not address this distinction or offer any reason why fiduciary duties applicable to municipal authorities are also owed by state officials.

Finally, even under plaintiffs' theory of the case, there would be a compelling argument for abstention under the Pullman doctrine since the district court could not decide the federal constitutional claim unless it

decided a substantial issue of state law, namely, whether the budgets passed by the Connecticut General Assembly violated Sec. 18 to Article III of the Connecticut Constitution. this is an unsettled issue that should be decided in the first instance by the state courts. Compare Board of Educ. of Valley View Community Unit Sch. Dist. No. 365U v. Bosworth, 713 F.2d 1316, 1320-21 (7th Cir. 1983)(Pullman abstention not appropriate in taxpayer suit brought by local governmental units and local taxpayers against county tax officials because state law issue was clearly decided).

Given this conclusion, it is unnecessary for us to reach the Eleventh Amendment issue. We have carefully considered the other points raised by plaintiff and find them to be without merit. For the reasons set forth above, the judgment of the district court is affirmed.,

Hon. John M. Walker, Jr., U.S.C.J.
Hon. Dennis G. Jacobs, U.S.C.J.
Hon. Robert C. Zampano, U.S.D.J.